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THE CONSTITUTIONAL DUTY OF A NATIONAL SECURITY LAWYER IN A TIME OF TERROR

Judge James E. Baker

National security lawyers are probably not in the forefront of the general public's mind when one refers to government lawyers, but they serve a vital mission within the public sector. In short, national security lawyers contribute to our physical security by providing daily advice to decision-makers, and in faithfully applying the law in rendering that advice, they secure our way of life.

September 11, 2001, changed so much about our lives. Others can debate the relative impact of Pearl Harbor and September 11th, and perhaps only the perspective of time will permit objective consideration. However, clearly September 11th changed forever how we perceive national security as individuals, communities and as a government.

I certainly felt at war with terror before September 11th, and internalized a sense of personal risk every time I went to work in the Old Executive Office Building. However, we *all* now feel a sense of personal vulnerability, not just for those in the armed forces and in government offices, but for our friends, and families, and citizens, generally that we did not feel before. This fear is not geographically specific. Nor is it threat specific. Harold Lasswell, the Yale law professor and behavioral political scientist described this process in another time as the "socialization of danger." The "socialization of danger," he wrote, was a permanent characteristic of modern violence.¹ But not for America, until September 11th.

September 11th has made us reconsider what we really mean by "national security." National security, at least in the government, has always been defined broadly with reference to the projection and protection of national interests. But as we all now know, and feel, national security is in its most fundamental sense freedom from external coercion – in particular, the physical protection of our homes and persons. This is a traditional and streamlined perspective on national security associated this century with writer-columnist Walter Lippman.

But as so many others have pointed out, physical security is not the end, but the means of securing our way of life. We can debate exactly what *that* means. But that proves the point. As individuals we *can* freely debate what that means. Way of life can mean everything from consumer goods to the preservation of specific cultural values. For me, way of life more than anything else means a society and a government bound by law, which is to say, bound by the Constitution with its Bill of Rights.

There are many different views on how best to protect our physical security and our way of life. A recent article described this debate as one between multilateralists, unilateralists, neo-imperialists, neo-isolationists, and minimalists. If that does not clarify the policy debate, let me be clear. I am not trying to advance a particular doctrinal perspective. With terrorism, and most issues, I am a contextualist and a realist – apply every doctrine to every problem until you

find the mix that works. But when it comes to lawyering, I am quick to espouse my doctrine — I am a constitutionalist.

In the area of law, there has been talk of new rules and sometimes no rules after September 11th. There has been renewed citation to the Doolittle Committee's Cold War conclusion that

... we are facing an implacable enemy whose avowed objective is world domination by whatever means at whatever cost. There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply.²

is the law of armed conflict silent as Cicero suggested. The principles of proportionality, necessity, and discrimination remain at the heart of the law of war, in both U.S. and international law. The context is different; but every national security decision still must be made according to law.

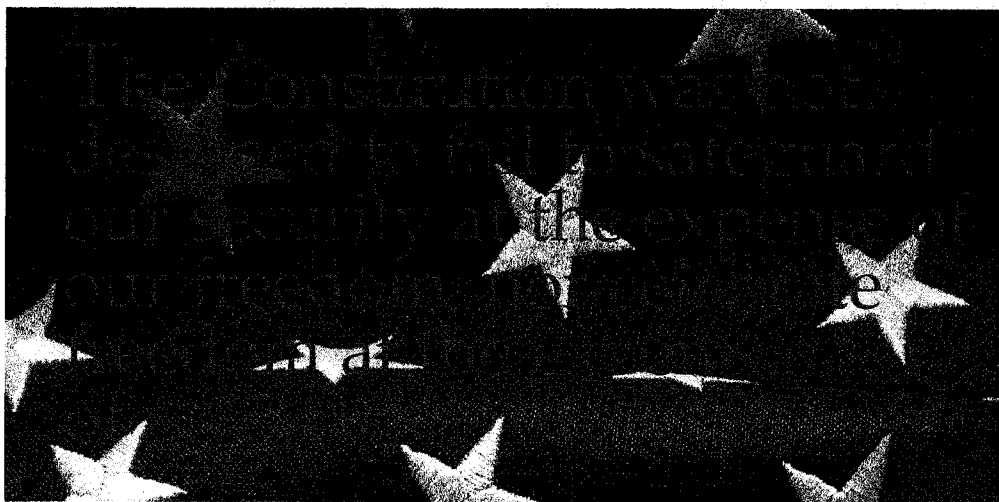
And the special responsibilities of national security lawyers have not changed. First, national security lawyers contribute to our physical security every day when they give substantive advice to the Homeland Security Office on personnel regulations; review targets; and support our process of military discipline. They do the same when they uphold executive branch process, ensuring the

national conduct... The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civilian and political rights. To be more safe, they at length become willing to run the risk of being less free.³

It is the national security lawyer's task to alert policymakers to this tension. To show both sides of every coin and, as Justice Jackson said, identify "the enduring consequences of our actions."⁴ Lincoln was great, the poet (and lawyer) James Russell Lowell concluded, in part because he was a lawyer *and* a lawyer who saw two sides to every issue.⁵

This is hardest to do when physical security — when lives — are at stake. But lawyers must continue to find and prevent the next Korematsu, while not letting legal ghosts impede or delay security. That is to say, not every moment of tension between security and rights is a Korematsu (here I am, of course, making allusion to the mass relocation of Japanese-Americans to internment camps in 1942, a policy upheld by the Supreme Court at the time, but criticized across the spectrum since). The Constitution was not designed to fail to safeguard our security at the expense of our freedom, nor celebrate freedom at the expense of security. It is designed to underpin and protect *us and* our way of life. National security lawyers must let it do both. At the same time, they must think big, see where we are going, and ultimately safeguard who we are by avoiding the bridge too far. And, in both roles, lawyers should be clear as to what is legal, and what is legal policy.

My point is one of process, not substance. The Constitution permits as well as constrains. Constitutional powers are separate and shared. Only those who think that law is an obstacle to national security, rather than essential to national security, will think that I am making a substantive point, when I argue that now is a time for lawyers, because now is a time when we lawyers need to



This, of course, was a restatement of the Latin dictum that in time of war the laws are silent. The socialization of danger does indeed raise new applications of law in a constitutional democracy. But much has and should remain the same for national security lawyers after September 11th. Foremost, the Constitution has not changed. And, we should not lose sight that it remains the root of our rule of law, and thus our society. Nor

Commander in Chief has the best of all views, unvarnished, no shortcuts, *and* on a timeline that works.

Second, national security lawyers will continue to provide for the security of our way of life. Now more than ever, they have a responsibility to teach, explain and apply the Constitution and turn it over to the next watch in as strong a position as they found it. If national security lawyers have ensured their place at the decision-making table and they have lawyered, then they will be scarred from debates over separation of powers, or the application of law, but no permanent harm will have occurred.

There are hard questions ahead, from which lawyers should not shy. Alexander Hamilton, with his robust view of executive authority, wrote in Federalist No. 8:

Safety from external danger is the most powerful director of

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explain just how good the Constitution is as a commitment to both security and liberty.

It takes moral courage to participate fully and objectively as a lawyer: to say yes, to say no, and more often something in between that guides. But you cannot have law without courage. We may be a government of laws, but "laws are made by men and women, interpreted by men and women, and enforced by men and women, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself."⁶

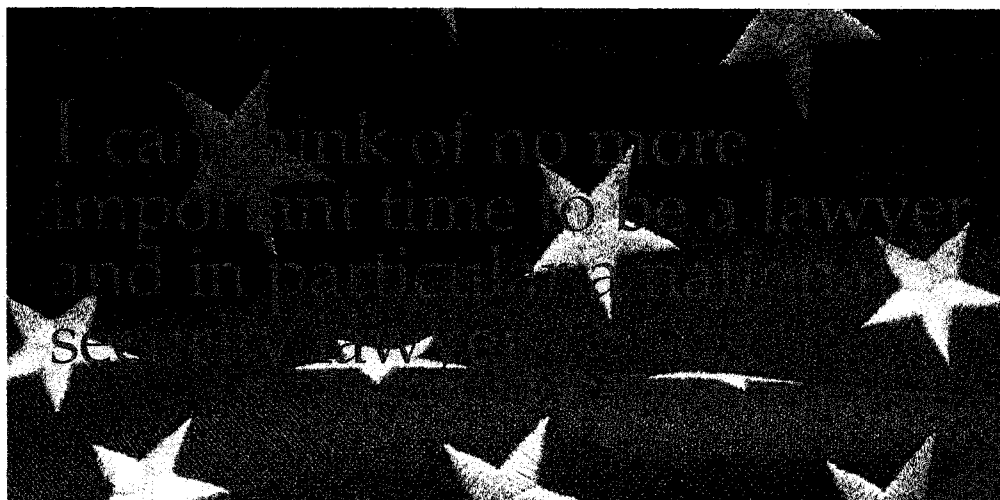
Therefore, law depends on the morality of those who apply it. It depends on the moral courage of lawyers who will raise tough questions, who dare to argue both sides of every issue, and who will insist upon being heard at the highest levels of decision-making, and ultimately call the legal questions as they believe the Constitution dictates and not necessarily as we may want at a moment in time.

This has particular resonance with government and military lawyers, because you have sworn to

support and defend the Constitution of the United States..., [and to] bear true faith and allegiance to the same. . ."

No other lawyers have as their daily mission something as noble as defending and bearing allegiance to the Constitution. A government or military lawyer upholds and defends the Constitution every day he or she comes to work, whether one is deployed on the Forward Edge of the Battle Area (FEBA) or in Washington, which with terrorism may be one and the same. That is a special responsibility, but it is not a new responsibility.

Starting with General Washington, fidelity to the rule of law, and subsequently the Constitution, has been part of the essential fabric of military honor. You will not find this in Janowitz's foundational study *The Professional Soldier*. Janowitz traces U.S. military honor to the European aristocratic tradition and emphasizes personal fealty to the Commander in Chief.⁷ But constitutional fidelity is part of our tradition of military honor and it is a large part of what has always set the United States military



apart as the world's finest.

In 1916, President Woodrow Wilson was asked to speak to the graduating Naval Academy class on the eve of United States entry into World War I. Remarkably, he arrived without a speech and simply got up and said what was on his mind, which adds to the beauty and sincerity of his words. This is how he closed.

I congratulate you that you are going to live your lives under the most stimulating compulsion that any man can feel, the sense, not of private duty merely, but of public duty also. And then if you perform that duty, there is a reward awaiting you which is superior to any other reward in the world. That is the affectionate remembrance of your fellow men – their honor, their affection.⁸

I can think of no more important time to be a lawyer and in particular a national security lawyer. Every day they come to work to provide for our physical security, by clearly and quickly advising the decision-maker. And, they help to secure our way of life by upholding the rule of law, spotting the enduring consequences of what we do, and facing squarely the sometime tension between security and liberty raised in Federalist No. 8. The national security lawyers who are true to this duty should never doubt their role or their worth, and while they may not always garner affection, they will always have the honor of having borne true faith and

allegiance to the Constitution. There is no higher calling. ♦

Notes

1. Harold D. Lasswell, "The Garrison State," *American Journal of Sociology*, Vol. 46, Issue 4 (Jan. 1941), 459.

2. Report on the Covert Activities of the Central Intelligence Agency, Sept. 30, 1954 (Doolittle Committee).

3. The Federalist Papers, No. 8: Hamilton, "The Effects of Internal War in Producing Standing Armies and Other Institutions Unfriendly to Liberty."

4. *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 634 (1952).

5. James Russell Lowell wrote, "His experience as a lawyer compelled him not only to see that there is a principle underlying every phenomenon in human affairs, but that there are always two sides to every question, both of which must be fully understood in order to understand either, and that it is of greater advantage to an advocate to appreciate the strength than the weakness of his antagonist's position." "Abraham Lincoln, 1864-1865", reprinted in *The Harvard Classics*, at 429.

6. A. Whitney Griswold, "The Basis of a Rule of Law," *Liberal Education and the Democratic Ideal*, Yale University Press (1959).

7. Morris Janowitz, *The Professional Soldier*, 215-232 (1960).

8. Woodrow Wilson, speech to graduating class of the USNA 1916, reprinted in Safire, William. *Lend Me Your Ears: Great Speeches in History* (1997).

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